84-1104

Office-Supreme Court,
FILED
OCT 26 1985
ALEXANDER L. STEVA
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JEROME PRZYBYLA, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jerome Przybyla
Petitioner, Pro Se
7327 Spruce Road
Anchorage, AK 99507

59 pp

QUESTIONS PRESENTED

1. Should the Fifth Amendment due process concept of fundamental fairness under a certain set of circumstances apply to an individual who relies, in good faith, upon information provided by the Government and commits an act that would ordinarily violate the law when no other remedy is available to him?

2. Whether the importance of maintaining the public's faith in its governmental institutions warrants a new trial when testimony of government agents in a criminal trial is deliberately misleading.

IN THE SUPREME COURT

OF THE UNITED STATES

• OCTOBER TERM, 1984

JEROME PRZYBYLA, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals Order affirming the conviction of the Petitioner is a criminal case entered on July 17, 1984.

TABLE OF CONTENTS AND AUTHORITIES

Page

Questions Presented

Table of Contents and Authorities . . i

Opinions Below 1

Jurisdiction of This Court 2

Constitutional Provision and Statutes Involved in This Case . . 3

Statement of the Case 4

Reasons for Granting the Writ

I. 7

II. 15

Conclusion

Cases:

Hayzes v. Isreal
DC Wis 1979 478 F. Supp, 846 . . 12

People v. McRae,
256 Cal.App.2d 95 18

United States v. Agura,
427 at 103, 96 S. Ct. at 2397 . . 12

United States v. American Honda Motor Co.,
273 F. Supp. 810 (ND 11, 1967) . .14

Page

United States v. Stofsky,
527, F. 2d 237 18

Constitutional Provision

Fifth Amendment 3

Statutes

5 USC § 7301 . . . . . 3, 53

Attachments

Appendix A 19

Appendix B 29

Appendix C 30

Appendix D 31

Appendix E 53

OPINIONS BELOW

The Order and Judgment of the Court of Appeals affirming the criminal conviction of the Petitioner in a jury trial appears in Appendix A to this Petition and is currently unreported. The Order of the Court of Appeals denying a Petition for Rehearing En Banc also appears in Appendix A.

JURISDICTION

The Judgment of the court below (Appendix A, infra, p. 16), was entered on July 17, 1984. A timely Petition for Rehearing was denied on August 30, 1984, thirty days after its filing (Appendix A, infra, page 16). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The constitutional provision is the Fifth Amendment, which provides, in pertinent part, as follows:

> No person... shall be deprived of life, liberty, or property without due process of law...

The statute involved in this case is 5 USC § 7301, which, in pertinent part, reads:

> "Code of Ethics for Government Service"
>
> "Any person in Government service should:
>
> " 1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.
>
> " 2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
>
> "10. Uphold these principles ever conscious that public office is a public trust.

STATEMENT OF THE CASE

Defendant/Appellant had a tax deficiency levied against him for the tax year 1977 (RT p. 62). He had received a Statutory Notice of Deficiency and at least one notice and demand for payment before March 8, 1983, (RT p. 63). Also, prior to that date, Defendant/Appellant had a bank account and several stock accounts seized (Defense Exh. A, RT p. 143).

Defendant/Appellant had also received a Publication 586A from the IRS, outlining his rights as a taxpayer (Defense Exh. B, Rt p. 154) during a collection procedure.

On March 8, 1983, Defendant/Appllant received notice by phone that the IRS, specifically Mary Atchison, would be out at his premises that day to make a seziure in order to satisfy Defendant/Appellant's tax deficiency.

Three agents from the IRS did go to Defendant/Appellantl's home and shop that morning in order to effectuate a seizure.

Defendant/Appellant asked the three IRS agents to leave, that they (IRS agents) were trespassing on his property, as he thought he could because of Publication 586A (RT. P. 157). The IRS Agents did not leave, and Defendant/Appellant withdrew the weapon he had in a pocket holster and escorted the agents off his property. At the time the weapon was shown, the IRS agents were attempting to place public seizure notices around his property (RT pp. 155-156).

There was a conflict in testimony at trial descussed on this brief as to whether or not Defendant/Appellant had aimed the weapon at anyone.

Defendant/Appellant filed a motion for acquittal, or, in the alternative, a new trial, on September 23, 1983 (CR 104), which was denied, without hearing, on October 14, 1983 (CR 108).

It is from the above that Defendant/Appellant appeals.

REASONS FOR GRANTING THE WRIT

I

Petitioner reliance upon agency pamphlet 586A is reasonable in conjunction with a common law understanding of Fifth Amendment rights. That Petitioner should have been aware of agency exemption from necessary compliance with provisions called for in our constitutional guarantees is a presumption rooted in the knowledge of statue granting specific privilege to the agency beyond the scope of a practical application inherent in a common law understanding of the implementation of those rights.

The court recognized that Petitioner did rely upon pamphlet 568A in making a show of force when he requested the government agents to leave, but dismissed such reliance as immaterial by claiming that the pamphlet does not imply that a taxpayer can

use a weapon to enforce his request. While it is indeed true that the pamphlet in no way implies the use of force as an alternative to recognized procedure, it does, in fact, establish the criteria for which these types of disputes may be resolved. When agency failed to abide by their own administrative procedure, Petitioner reasonably inferred that they were in violation of fundamental due process rights.

In dismissing the reliance upon Publication 586A, the court failed to recognize the following: (1) that the same branch of the IRS responsible for the publication of the pamphlet was the branch that was on Petitioner's property to effect the seizure (RT p. 90); (2) that at least one of the agents was armed and that this was known by Petitioner; (3) that Pe-

titioner had already had property seized for the same alleged debt (RT pp. 79-82); and (4) that Petitioner had tried to stop the previous seizure by court action; and, even though that case had been neither resolved or dismissed, the previous property had been seized.

The IRS was on his property for further seizure, and the Petitioner knew that court action is not a remedy.

After having informed at least one agent about the previous seizure and subsequent court case, Petitioner was informed that the IRS was not concerned with the previous seizure or pending litigation (RT pp. 79-82).

Thus, from a position of perceiving a right without a remedy, Petitioner elected not to relinquish property to the Internal Revenue Service;

and, therefore, made a show of force after requesting that the agents leave the premises.

The willful quality of the show of force bears direct relationship to the pamphlet from which Petitioner inferred that procedures were not being adhered to. This fact, however, is contingent upon the court's recognition that the reliance upon 586A is material within the framework of the facts of this case, especially when taken in conjunction with crucial testimony given by the agents involved, which bears direct relationship over whether or not Petitioner's posture was, in fact, aggressive or defensive.

> ...except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, and, therefore, as a matter of due process, a federal court may review the sufficiency

> of the evidence to convict a defendant of the crime charged. Hayzes v. Isreal, DC Wis 1979 478 F. Sup. 846.

The Government argues that the inconsistent statements of the IRS agents only go to the incredibility of the agents as witnesses and not to a material element to the crime. Whether the gun was deliberately aimed goes directly to the heart of willfulness. The fine line between aggressor and defender is implicitly connected to the testimony of the agents involved. The misleading statements of the IRS agents could easily have swayed in United States v. Agurs, 427 U.S. at 103, 96 S. Ct. at 2397 should be used, and that is a new trial should be granted if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

The Government contends that

the testimony of the agents involved was misleading, but tries to excuse their conduct by waving it away as credible testiomony only inconsistent due to the passage of time and fear at the moment. Appellee Brief, p. 15).

Petitioner would invite the court to look at Appellant's opening brief, pp. 14-25, and would further state that it is difficult to believe that passage of time would dull the memories of the agents involved in regard to such a crucial issue.

Certainly, it was reasonable for the Petitioner to view the agents as acting outside of the scope of their authority and to consider them as trespassers. Just as certainly, it is fundamentally unfair to now punish the Petitioner for treating the very department from the very agency that

informed him of his rights as a taxpayer as trespassers when they failed to follow their own instructions.

Without the presence of Publication 586A, there would have been no confrontation; and, if Publication 586A had been adhered to, there would have been no confrontation. How, then, can Petitioner be held justifiably responsible for the entirety of the unfortunate incident?

> Due process is essentially a recognition of the requirement of fundamental fair play under a given set of circumstances." United States v. American Honda Motor Company, 273 F. Supp. 810 (ND 11, 1967).

REASON FOR GRANTING THE WRIT

II

Public confidence depends upon the perception that, when an individual seeks redress of grievance, he receives due process under law. When misleading testimony is allowed to go unchecked, it is an affront to the very concept of due process, but when testimony is tainted with deliberately misleading testimony, it becomes paramount to perversion of the public trust when clarification is not actively sought.

Documentation of IRS abuse could well fill the page limitations set forth in this writ; suffice it to say that from untimely audits, to truped up charges for the purpose of defeating political office holders critical of their tactics, to dragging in pregnant women throught the smashed window of a seized Volkswagon over an assessment

without the courtesy of any administrative procedures, the Internal Revenue Service exports fear to millions of Americans. Taxpayers carry a burden unprecedented in American society and in high likelihood to go proportionately higher in the years just ahead. If the erosion of confidence in the tax collection system continues to grow as it has these past few years, the day is going to arrive that guns may be drawn by frustrated taxpayers with a fundamental belief in a right but with no remedy to aid in the preservation of their rights.

The ramifications of failure to address agency and court leniency towards contradictory information, especially when it hinges on the accusation of willfullness ascribed to Petitioner's behavior, in this case, is widespread growth of an already

mistrusting population.

When an individual with no criminal record is indicted for assault with deadly force against an agency of the United States, the event itself should serve as prima facie evidence of a serious breakdown of the procedural administration of the agency itself. It is not difficult to understand the lack of trust that this fear of the IRS instills in people, fear produced through failure to abide by even its own regulations, and willingness to bend the rules in order to meet their collection quotas.

In conclusion Petitioner reiterates that reasonable belief in pamphlet 568A was made in good faith, based upon a fundamental understanding of Fifth Amendment rights under the United States Constitution.

5 USC 7301 provides a code of ethics establishing a higher testimonial duty for impartially rendering the truth without bias when acting in an official capacity. This very code reveals the recognition by the Legislature of the importance of public trust and confidence in the existing Government agencies and adminstrative procedure.

Petitioner further maintains the testimony to be crucial. The test is whether the statements made could influence the tribunal before it, People v. McRae, 256 Cal.App.2d 95 or, at worst, some probability that the result may have been altered. United States v. Stofsky 527 F. 2d 237.

CONCLUSION

For these reasons, Petitioner prays that this court will Grant this Writ of Certiorari.

APPENDIX A

OPINIONS BELOW

A. OPINION OF NINTH CIRCUIT COURT OF APPEALS FILED JULY 17, 1984:

ORDER AND JUDGMENT

Before BROWNING, chief judge, CANBY, Circuit Judge, and Williams*, District Judge.

PER CURIAM:

Appellant was convicted of assaulting an IRS agent and impeding the administration of the tax laws. 18 USC § 111; 26 USC § 7212(a). We affirm.

Three Internal Revenue Service (IRS) agents attempted to seize appellant's real property to satisfy a tax deficiency. Appellant was informed that agents would arrive the day of the visit to carry out the seizure.

When the agents presented themselves, appellant, without identifying himself, requested they leave the property.

---

* Honorable Spencer M. Williams, District judge, United states District Court for the Northern District of California, sitting by designation.

agents began to post seizure notices despite appellant's request. Appellant repeated his request and drew a gun. The trial testimony does not clearly establish that appellant pointed the gun directly at any of the agents, but he did click off the safety and wave the gun in their general direction as he escorted them off his property.

Appellant was indicted for assaulting an IRS agent, impeding the administration of the tax laws, and attempting to rescue property after it was seized, in violation of 18 USC § 111 and 26 USC §§ 7212(a), 7212(b). The

jury convicted appellant of the first two offenses, and acquitted him of attempting to rescue seized property.

(1) Jurisdiction of the District Court.

Appellant argues the district court has jurisdiction only of prosecutions under Title 18, and not of prosecutions under Title 26. The language of 18 USC § 3231 is not limited. It grants district courts jurisdiction "of all offenses against the laws of the United States." Appellant argues, however, that according to the Reviser's Notes, section 3231 was intended to effect no change in substance in prior sections that had explicitly granted jurisdiction only over Title 18 offenses. This language in the Reviser's Note, however, refers only to the House Bill. A Senate amendment to the 1948

revision broadened this section to include all crimes against the United States. See S. Rep. 1620, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. Serv. 2427, 2430-31. Under the unambigous language of section 3231, the district court clearly had jurisdiction over Title 26 offenses. See, e.g., United States v. Drefke, 707 F. 2d 978, 981 (8th Cir. 1983); United States v. Eilertson, 707 F. 2d 108, 109 (4th Cir. 1983).

(2) Use of Force.

Appellant argues that his conviction violates due process because he acted in reliance on an IRS pamphlet referring to a taxpayer's "right to refuse to permit Collection personnel to enter upon [the taxpayer's] private property when the purpose of the visit is to conduct a seizure of [the taxpayer's] assests." Nothing in the

IRS pamphlet implies that a taxpayer could use a weapon to enforce his request. Even if appellant were justified in requesting the agents to leave his property, see G.M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977), use of a weapon was unlawful. See United States v. Johnson, 542 F. 2d 230, 233 (5th Cir. 1976); United States v. Cunningham, 509 F. 2d 961, 963 (D.C. Cir. 1975). Appellant failed to identify himself and made no attempt to discuss his reason for requesting that the agents leave his property. He simply decided that a show of force was necessary to get the agents to leave. Appellant's conviction does not involve any fundamental unfairness or violation of due process.

(3) Sufficiency of the Evidence and Inconsistent Verdicts.

Appellant argues his conviction on Counts I and II "was against the weight of the evidence and contrary to the law."

If appellant is arguing that the evidence was insufficient to convict, the argument has no merit. Viewing the evidence in the light most favorable to the government, see Glass v. United States, 315 U.S. 60, 80, (1942), a rational jury could conclude that all elements of both Counts I and II had been proven. Appellant admits to drawing a weapon to compel the agents to leave his property, knowing that they were federal agents. There was evidence from which a jury could conclude he did so willfully.

If appellant is arguing that the verdicts are inconsistent, that argument is still meritless. The jury

could have acquitted appellant of the charge under 26 USC § 7212(b) because it concluded that at the time appellant drew his gun he did not know the property had been seized as required by this section. In any event, inconsistent jury verdicts are generally not a ground for reversal, see United States v. Upshaw, 685 F. 2d 1202, 1203 (9th Cir. 1982), even when a "conviction is rationally incompatiable with an acquittal." United States v. Brandon, 633 F. 2d 773, 779 (9th Cir. 1980).

(4) Testimony of the IRS Agents.

Appellant's final argument is that the verdicts must be set aside because they are based on perjured or deliberately misleading testimony. Appellant asserts the testimony of the agents at trial that appellant pointed the gun directly at one of them conflicts with earlier statements by the agents. This testimony, app-

ellant argues, could have affected the jury's conclusion on the issue of appellant's willfulness.

We find no merit in appellant's claim. The agents' pre-trial statements were not inconsistent with their trial testimony. Agents Atchison testified before the grand jury and at trial that she saw the gun pointed directly at Agent Erickson before she turned to the other agents to suggest they leave. Agents DeMay's pretrial statement to an IRS investigator that he "never saw the gun pointed directly at anyone" was not inconsistent with his trial testimony that the gun was pointed "in the direction of" Agent Erickson. Under cross-examination at trial Agent DeMay repeated the substance of his pretrial statement

and explained any apparent inconsistency by testifying. "It was pointed toward the direction of Dave Erickson. I did not see it pointed directly at him but I did see it at that angle." Finally, Agent Erickson's pretrial statement that he did not see the gun pointed directly at him was not necessarilly inconsistent with his trial testimony that the gun was pointed in his direction from time to time.

Even if the agent's pretrial and trial statement were not identical, there was no justification for setting aside the verdicts. Appellant received copies of the prior statements of the witnesses and used them during cross-examination. See United States v. Cervantes, 542 F. 2d 773, 776-77 (9th Cir. 1976). The jury was fully informed of the alleged discrepancies

and concluded the evidence was sufficent to convict.

AFFIRMED.

APPENDIX B

B. ORDER DENYING PETITION FOR REHEARING ENTERED AUGUST 30, 1984

ORDER AND JUDGMENT

Appellant's petition for rehearing is denied.

APPENDIX C

C. DEFENSE EXHIBIT B (RT p. 154, lines 12-14) (Publication 586A)

In this case the Defendant/Appellant received a pamphlet from the Internal Revenue Service outlining his rights as a taxpayer during a collection seizure. This pamphlet was sent to the Defendant/Appellant by the very same department of the Internal Revenue Service that came to seize his property and was introduced into evidence as Defense Exhibit B (RT p. 154, lines 12-14), and in pertinent part reads:

> J. Entry upon Private Property
>
> You have the right to refuse to permit collection personnel to enter upon your private property when the purpose of the visit is to conduct a seizure of your assets. If you decide to avail yourself of this right, the IRS may then decide to seek court authorization to enter upon the property to carry out the seizure action.

APPENDIX D

D. GOVERNMENT TESTIMONY (pages 15-25 of Appellant's Brief)

A. Testimony of Mary Atchison.

1. Grand Jury Testimony (attached hereto as Exhibit A).

And so then he had pulled gun out and I looked and it was pointed at Dave and I just said, come on, let's turn around and go to the car. (Grand Jury Testimony p. 17, lines 23-25, hereinafter GJ p. 17, lines 23-25)

We were kind of walking abreast and the man with the gun was behind us and I kind of stepped aside and I said, please get a picture of the guy back here with the gun and then he put the gun down to the ground. He pointed it down to the ground. (GJ p. 18, lines 21-25)

JUROR: On this--would you describe this gun deal one more time? He did'nt point the gun at you?

A. He did, yea.

JUROR: He pointed the gun at you?

A. Okay.
(GJ p. 30, lines 14-18)

They just stood there and they kept putting up this sign and

that's when he drew the gun out of his pocket and it was pointed at Dave. And I said, fellows, he's got a gun, let's go and we left. They turned around then and saw it and we left.
JUROR: Are you saying that your other two associate agents also saw the gun?

A. Yes. They saw the gun at that point, when I said, he's got a gun and then he had it out of his--had it out of his pocket and it was pointed at Dave.

2. Trial Testimony - Direct Examination

"As long as you are taking pictures be sure you get a picture behind us of the guy with the gun." When I said that I turned and I looked at the gentleman behind us and he dropped the gun to the ground. It appeared to me that the gun had been pointed at us and when I said that and turned around he dropped it to the ground.
(Rt p. 78, lines 19-24)

3. Trial Testimony - Cross-Examination

Q. Now I think you testified also that Mr. Przybyla pointed a gun at a man named Dave. Is that correct?

A. This is correct.

Q. At what point in time would that have been?

A. Immediately after he took it out of his pocket.

Q. Can you tell me then where everybody was standing at that time in front of that garage?

A. Mr. Erickson was on the far left at the corner of the garage door, in the front of the building. He had his arms over his head, putting up the notice on the garage door. Mr DeMay was standing immediately, maybe a little to the left of Mr. Erickson, and I was standing to the left of those two and with my back to the garage door. This gentleman came out of the garage door and said to me, "I am going to ask you to leave. You are trespassing on private property." At that time I turned, I turned to face the garage, with the gentleman on my left and Mr. Erickson and Mr. DeMay on my right, and I was standing in between them, and the gentleman with the gun took the gun out of his pocket and it was pointed right at Dave.

Q. You say the gun was pointed. What was its motion like? Did he pull the gun out and stop

and point it at Dave, or did he plull the gun out and - -

A. His motions were very slow and deliberate and he handled the gun very carefuly. He held his arem like that (indicating) and he held the gun very carefully but it was pointed at Dave.

Q. But he was talking - - who was closest to him?

A. I was closest to him.

Q. And in your opinion to whom did he address "This is private property, please leave?" Was that addressed to you?

A. He addressed it at all of us.

Q. Okay. To you as a group. You say he pulled the gun and pointed it, and what I am trying to ask you, was that a continuous motion? Can you show us, can you stand up and show us?

A. No, I can't, because when I saw the gun in his pocket I turned around to the fellows, I turned around to Ron and Dave. I wanted to, to pick them up and move them and they just kept putting up that notice, and I thought "if I get out of here, if we go ahead and leave he won't pull the gun out of his pocket." So then I looked at them and when I looked back at him the gun was pointed at Dave, he had taken it out of his pocket while I turned around to try to get them to leave.

Q. And what happened - - you turned around and you saw the gun pointed at Dave?

A. Yes.

Q. What happened immediately after that?

A. Immediately after that I said "Fellows, he's got a gun. Let's go."

Q. Were you still facing Mr. Przybyla at the time?

Q. What period of time elapsed from the time when you saw the gun pulled and then you turned around and said "Let's go. He has a gun?" What period of time elapsed between that time and the next time and the next time you looked at Mr. Przybyla?

A. It was probably only a few seconds. It seems like forever.

Q. When you looked at Mr. Przybla again until the lady stepped out to take pictures and at that time the gun was moving like that (indicating) down to his side.

Q. Are you saying that that was about a period of three seconds once you started walking down?

A. Sir, I'm sorry - -

Q. Well, I did'nt mean - -

A. It seemed like it was about fifteen or twenty minutes.

Q. It was a few seconds anyway. But what I am trying to ascertain now is, okay, you saw the gun out and pointed and you said "Let's go, fellows," started walking down the driveway and whatever amount of time it took, seconds, it seems like to you, whatever amount of time it took, you saw a lady coming just taking pictures. You said "Take pictures of the man behind us with the gun," and as you turned you saw the gun going back?

A. I saw the gun moving down to the side.

Q. During that period of time you really don't know where the gun was, do you? During the time your back was turned?

A. That's right.

Q. And the only time you every saw Mr. Przybyla with the gun in his hand was during those few seconds at the time because when you saw the gun you turned around?

A. How long does it take to shoot?

Q. Well, I am not trying to harass you.

A. I assume it was only a second, yes.

Q. So isn't it possible since you didn't see Mr. Przybyle draw the gun out like this and slowly point it down because it was a dangerous weapon?

A. He pulled it out and pointed it.

Q. That's right. He may have pointed it up and as you were walking to the car he was just putting it down to the side because you folks were finally leaving. Isn't that a possibility?

A. It's a possibility.

Q. And you really don't know what happened because you had your back to him? Isn't that correct?

A. That's correct. I wasn't about to charge him. (Rt pp. 86-89, lines 10-23)

As can be seen, Mary Atchison told the Grand jury that the gun was

aimed at herself and at Dave Erickson and, also, that both agents saw the gun aimed. Yet, on a cross-examination she admits she only saw the gun for a few seconds and, as will be seen, one of the IRS agents, Ronald DeMay, never told the Grand Jury or most probably the IRS investigating agents, Mr. Robert Koppe, that he saw the gun aimed at anyone. It wasn't until trial that that testimony came out.

B. Testimony of Ronald DeMay

1. Grand Jury Testimony (attached hereto as Exhibit B).

JUROR: You mean, he was raising it vertically in more or less an arc, is that what you're saying?

A. Yeah. It's like when you hold it out on the side, okay, he was holding it like this on the side. Then he raise it out. It's like he didn't want it -- it's not like it was here so in face of fired (sic) or something like that, he had full control of the weapon.

JUROR: He did'nt want to shoot himself in the leg, in other words?

A. Right. But he knew what he was doing when he was holding the weapon itself. At any point in time, if he wanted to, he could have shot it. All he had to do when he was raising it up and down is point the barrel and he could have shot it.
(GJ p. 8, lines 1-18)

2. IRS Special Investigator Robert Koppe's Report with Ronald DeMay (hereto attached as Exhibit C).

When the unidentified man pulled the gun, he seemed to know what he was doing. DEMAY never saw the gun pointed directly at anyone. The man had the gun pointed up at an approximate 45-degree angle or down at a similar angle. The man was in control of the situation.
(Robert Koppe's Report, p. 1, ¶ 6)

3. Trial Testimony - Direct Examination

Q. What did he do with this weapon?

A. At that time he proceeded - - Mary did say, "He has a gun, we'd better leave." We then started to proceed to leave. The weapon when I did see it was pointed in this type of dir-

ection (indicating), almost straight in front of me and pointed in the direction of Dave Erickson. We then just turned and started to leave the premises, and he was behind us. Mary and I were on the right side, and Dave Erickson was on the left side. As we were leaving I did hear a click. It could have been the safety of the gun or the gun being cocked.
(RT p. 108, lines 13-22)

4. Trial Testimony - Cross-Examination

Q. And during that investigation you had some contact with Mr. Koppe, the investigator, didn't you?

A. Yes, I did.

Q. And you gave Mr. Koppe, you talked with Mr. Koppe about the investigation and that incident didn't you?

A. Yes, I did.

Q. Do you recall telling Mr. Koppe at that time that you didn't see the gun pointed at anybody?

A. I don't recall, when I said I didn't see the gun pointed at anybody, I am not sure what you are getting at. Can you rephrase the question. I am not sure.

Q. Yes, I will. Did you tell Mr. Koppe that you never saw the gun pointed directly at anyone, that the man had the gun pointed up at approximately a forty-five degree angle or down at a similar angle, and to you it appeared that the man was in control of the situation?

A. In control of the situation, where I was meaning maybe pointing the gun maybe point-blank, I did not see it. If it was at this type of an angle (indicating), going down, yes, I did.

Q. What you are saying is that from time to time the gun crossed the path that had a bullet come out of it it may have hit somebody?

A. It would be possible.

Q. It may have hit somebody?

A. Yes.

Q. But you don't recall this individual he has been talking about ever standing there and pointing directly at somebody and stopping there as if this were a deliberate aim?

A. The only thing I did see was when he came out of the building and Mr. Przybyla pulled the

> weapon out and pointed the gun at this angle (indicating), and it did stay there and I was looking probably about this length (indicating) away. I was more interested in looking at the gun. It was pointed toward the direction of Dave Erickson. I did not see it pointed directly at him but I did see it at that angle. (RT p. 112-114, lines 20-24)

Here Mr. DeMay told the Grand Jury that the Defendant/Appellant was raising the gun up and down and could have shot had he decided to point it at somebody. Mr. DeMay also at least created the impression in Mr. Koppe's mind that he never saw the gun aimed at anyone. It wasn't until trial on direct examination that Mr. DeMay decided the gun was actually pointed at someone, here, Dave Erickson. Mr. DeMay repeats this on cross-examination and then finally admits that he really didn't see the gun pointed at anyone.

This testimony is contradictory and at best deliberately misleading.

C. Testimony of Dave Erickson

1. IRS Special Investigator Robert Koppe's Report with Dave Erickson (hereto attached as Exhibit D).

After the man drew the gun, ERICKSON saw the gun pointed at a 45-degree angle up. ERICKSON never saw the man aim the gun directly at him. As ERICKSON walked from the property, the gun was either at a 45-degree angle or straight up. ERICKSON kept glancing back at the gun, When ATCHISON told the female taking pictures to get a photograph of the gun, the man placed the gun down and behind him. (Robert Koppe's Report, p. 1, ¶4)

2. Trial Testimony- Cross-Examination

Q. And when you turned to leave where was the gun? How was it pointed?

A. It was pointed basically at my head, it may have went over.

Q. Did you see that gun move at any point?

A. Yes. He moved his hand several times.

Q. So how long were you looking at Mr. Przybyla when he had the gun in his hand that first time?

A. From that point on I watched him almost the whole time out except when I looked forward at the camera.

Q. I just want to make sure I understand. So it is your testimony that you turned and you saw the gun sort in this direction (indicating)?

A. Yes.

Q. And did you turn your back again to the gun? Or not? Or did you continuously watch the gun?

A. I recall that I watched it all the way out there except for one time I looked forward at the camera. But basically most of the time I was watching it and his eyes.

Q. And you saw the gun move in different directions, is that correct? As you were walking out.

A. Yes. When he put it down it would have changed directions.

Q. So is it your testimony then that he would be walking like this (indicating) and then like this (indicating), and then maybe would bring the gun up again.

A. No, one time he put it down and it clicked, so he either put the safety on or he put it off at that point. He took his left hand over and his hand down and it clicked. I definitely heard the click.

Q. I understand that, Mr. Erickson. I thought that you testified that he was moving, you know, the gun was in different positions at different times? I thought that was your testimony?

A. Yes, I did. He put the gun down, and up, but he wasn't doing it continuously. He would hold it then, for a few feet and then put it down.

Q. That's what I was trying to get at.

A. When they were taking pictures Mary stepped back so they could get a picture of the gun, then he put it down and tried to hide it.

Q. Now was that the first time he put the gun down when the lady was taking pictures?

A. No.

Q. So you don't know whether he was trying to hide it or not because he had put it down before hadn't he?

A. (Pause)

Q. That's just your opinion? Right?

A. Right.

Q. Now did you give a statement to Mr. Koppe in regard to this incident, the investigating officer?

A. Yes, I did.

Q. And at that time do you recall telling Mr. Koppe that you saw the gun at a 45 degree angle but that you never saw it aimed at yourself?

A. No, I did not say that in my statement. I said the gun was pointed in my direction.

Q. So you are saying that you didn't say you never saw the man aim the gun directly at you?

A. I dont't recall making that statement. I only recall saying that it was pointed in my direction at the time.

Q. Did the man ever actually aim the gun at you?

A. You are going to have to define aim. If pointing it at me was aiming, yes, he did.

Q. But you never saw the man deliberately stand there and aim the gun at you? But you saw the gun pointed in your direction from time to time. Is that whay you are saying? Is that how you define aim?

A. Yes, I think you could say that is correct. I probably passed through the line of the bullet as I turned around.

Q. So from time to time the barrel of the gun was in your direction but you don't recall it being deliberately being aimed right at you.

A. I can't define his motive as whether he did it deliberately or not. I am just saying what I saw.
(RT pp. 101-104, lines 21-17)

Here, Mr. Erickson forgot that he had told Mr. Koppe that he ever saw the gun aimed at himself or Mr.

Koppe completely misunderstood. When counsel attempted to rectify the situation on cross-examination, like Mr. DeMay and Miss Atchison, Mr. Erickson became at best deliberately misleading and evasive by first claiming the gun was pointed at his head and finally admitting that all that really happened was that from time to time the gun may have crossed the plane of his body.

D. Argument. A new trial may be granted where it appears the verdict may have been secured by prejured testimony, but the perjury must relate to a material issue or point of inquiry, although it does not have to be material to the main issue.

The above is what we have in this case. Counsel would remind the

Court that the jury deliberated for six hours or better before they came back with a verdict and when they did come back, they acquitted the Defendant/ Appellant on Count III. Whether or not the gun was aimed at any of the agents bears directly on the issue of willfulness. Defendant/Appellant alleged that he felt his actions were within the law because he had determined through Publication 586A (already discussed) that the three IRS agents on his property were criminal trespassers once he had requested them to leave. Surely, a show of arms 43 to chase away a criminal trespasser is more reasonable than a gun immediately aimed at a trespasser. The test is whether the statements made could influence the tribunal before it, People v. McRae,

256 Cal.App.2d 95, or at worst some probability that the result may have been altered. United States v. Stofsky, 527 F. 2d 237.

Here, all three witnesses were Internal Revenue Service agents or officers. Certainly it is reasonable to expect that a jury would pay close attention to their testimony.

Also, perjury will lie even if a witness testifies as to opinion or belief if the witness does not hold that opinion or belief, People v. Dixon, 99 Cal.App.2d 94, 221 P.2d 198, or if the perjury is intended to bolster the testimony of a witness on some material point. People v. Patterson, 64 Cal.App. 223, 221 P. 394. This would appear to be true at least in Mr. DeMay's case.

However, even if the Court feels

of the indictment should be reversed, or, in the alternative, a new trial should be granted.

that technically perjury wasn't committed, it is immaterial in a criminal case as long as the testimony is merely misleading in determining whether prosecution's nondisclosure is sufficent material to the jury's determination of defendant's guilt to require a new trial. United States v. Iverson, 637 F. 2d 799 (1980 DC).

In this case, the prosecutor should have known the testimony was deliberately misleading since he was counsel assisting at the Grand Jury hearings and had access to the discovery materials (Grand Jury Testimony and Robert Kopp's Reports) long before they were turned over to this counsel at trial.

Defendants/Appellant has been denied a fair trial and the Verdicts of guilty on the remaining two counts

APPENDIX E

5 USC § 7301: "Code of ethics for government service

"Any person in Government service should:

"1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

" 2. Uphold the Constitution, laws, and legal regulations of the United states and of all governments therein and never be a party to their evasion.

" 3. Give a full day's labor for a full day's pay: giving to the performance of his duties his earnest effort and best thought.

" 4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.

" 5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not: and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

" 6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

" 7. Engage in no business with the Government, either directly or indirect-

ly, which is inconsistent with the conscientious performance of his governmental duties.

" 8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

" 9. Expose corruption wherever discovered."

"10. Uphold these principles, ever conscious that public office is a public trust."

No. 84-1104

(2)

Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME PRZYBYLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Hodgdon v. *United States*, 365 F.2d 679, cert. denied, 385 U.S. 1029 3

United States v. *Cunningham*, 509 F.2d 961 3

United States v. *Danehy*, 680 F.2d 1311 2

United States v. *Ferrone*, 438 F.2d 381, cert. denied, 402 U.S. 1008 3

United States v. *Johnson*, 542 F.2d 230 2-3

United States v. *Martinez*, 465 F.2d 79 3

United States v. *Simon*, 409 F.2d 474, cert. denied, 396 U.S. 829 3

Statutes:

18 U.S.C. 111 ..... 1, 2

26 U.S.C. 7212(a) 1, 2

26 U.S.C. 7212(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1104

JEROME PRZYBYLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he acted justifiably in reliance on an IRS pamphlet when he drew a gun on revenue officers attempting to effect a seizure of his property.

1. Following a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of assaulting an IRS agent, in violation of 18 U.S.C. 111, and of impeding the administration of the tax laws, in violation of 26 U.S.C. 7212(a). He was sentenced to consecutive terms of three years' imprisonment on the former count and to one year's imprisonment on the latter. The court of appeals affirmed (Pet. 19-28) and denied a petition for rehearing (Pet. 29).

The facts established at petitioner's trial were essentially as follows. On March 8, 1983, petitioner was informed that IRS agents would arrive at his premises later that day to effect seizure of his real property in satisfaction of his

unpaid tax liabilities. When the three agents arrived, petitioner, without identifying himself, asked that they leave (Pet. 20). Despite petitioner's request, the agents began to post seizure notices around the premises. Petitioner then produced a hand gun, clicked off the safety mechanism, and, waving the gun in the agents' general direction, escorted them off his property (*ibid.*).

Petitioner was indicted for assaulting an IRS agent, in violation of 18 U.S.C. 111, and impeding the administration of the tax laws and attempting to rescue property after it had been seized, in violation of 26 U.S.C. 7212(a) and (b), respectively. The jury convicted petitioner of the first two offenses and acquitted him of the third. The court of appeals affirmed in a per curiam opinion (Pet. 19-28).

2. Petitioner contends (Pet. 7-14) that his conviction violates due process because he acted in reliance on IRS Publication 586A, which informs taxpayers: "You have the right to refuse to permit collection personnel to enter upon your private property when the purpose of the visit is to conduct a seizure of your assets" (Pet. 30). Petitioner concedes that this pamphlet "in no way implies the use of force as an alternative to recognized procedure" (*id.* at 8). He nevertheless argues that his threatened use of deadly force was justified by the agents' alleged nonconformity with IRS administrative practice (*id.* at 8).

This claim is plainly meritless. Petitioner's use of a weapon was unlawful, irrespective of any right he may have had to refuse to permit IRS agents to enter his property. The courts of appeals are in agreement that a citizen has no right forcibly to resist an arrest or search by one known to be a government officer, even where it is subsequently determined that the officer's action was improper. See, *e.g.*, *United States* v. *Danehy*, 680 F.2d 1311, 1315-1316 (11th Cir. 1982); *United States* v. *Johnson*, 542 F.2d 230, 232-233

(5th Cir. 1976); *United States* v. *Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975); *United States* v. *Martinez*, 465 F.2d 79, 82 (2d Cir. 1972); *United States* v. *Ferrone*, 438 F.2d 381, 389-390 (3rd Cir.), cert. denied, 402 U.S. 1008 (1971); *United States* v. *Simon*, 409 F.2d 474, 477 (7th Cir.), cert. denied, 396 U.S. 829 (1969); *Hodgdon* v. *United States*, 365 F.2d 679, 685 (8th Cir. 1966), cert. denied, 385 U.S. 1029 (1967). As noted by the Fifth Circuit in *Johnson* (542 F.2d at 233):

> We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers. Other remedies are available for those police actions that are based on unreasonable suspicions or technically defective warrants.

Petitioner's asserted belief that "court action is not a remedy" (Pet. 10) plainly does not justify his threatened use of deadly force against IRS personnel. Petitioner alleges no conflict among the circuits on this question and it warrants no further review.

Petitioner also contends (Pet. 15-18) that his conviction should be reversed because the testimony of the IRS officers concerning the aiming of the gun was inconsistent and deliberately misleading. As the court of appeals concluded (*id.* at 26), however, the agents' pretrial statements were not inconsistent with their trial testimony. Agent Atchison testified both before the grand jury and at trial that she saw the gun pointed directly at Agent Erickson (*id.* at 26, 31-34). Agent Erickson's pretrial statement that he did not see the gun pointed directly at him was not inconsistent with his trial testimony that the gun was pointed in his direction from time to time (*id.* at 27, 43, 47). And Agent DeMay's pretrial statement that "he never saw the gun pointed directly at anyone" was not inconsistent with his trial testimony that the gun was pointed "in the direction of" Agent

Erickson (Pet. 26, 39-40). Agent DeMay explained any apparent inconsistency on cross-examination: "[The gun] was pointed toward the direction of Dave Erickson. I did not see it pointed directly at him but I did see it at that angle" (*id.* at 27, 42).

Even if there were inconsistencies between the agents' pretrial statements and their trial testimony, that would be no basis for setting aside the jury's verdict. Petitioner received copies of the agents' pretrial statements and used them during cross-examination (Pet. 27). The jury was thus aware of the alleged discrepancies and nonetheless found the evidence sufficient to convict. There is no basis for further review of this factual question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1985

DOJ-1985-04